No. 93-144

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, TRUSTEE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONER

PAUL VAN TRICHT*
DAVID W. WOODGERD
Special Assistant Attorneys General
Office of Legal Affairs
Department of Revenue of the State of Montana
P.O. Box 202701
Helena, Montana 59620-2701
(406) 444-2460

Attorneys for Petitioner, Department of Revenue of the State of Montana

**Counsel of Record*

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QUESTION PRESENTED

Whether the assessment of a state tax of $181,100 on the possession and storage of 1,811 ounces of marijuana, imposed separate and apart from any criminal penalty, violated the double jeopardy prohibitions of the Fifth and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 986 F.2d 1308 (9th Cir. 1993) (Appendix to the Petition [hereinafter Pet. App] 1a) The opinion of the district court, *Drummond v. Dept. of Revenue*, No. CV-90-084-PGH, 1991 WL 365065, (D. Mont., April 23, 1991) is unreported. (Pet. App. 13a) The opinion of the bankruptcy court is reported at 145 B.R. 61 (Bankr. D. Mont., May 8, 1990). (Pet. App. 24a)

The opinion of the Montana Supreme Court, which conflicts with the decision of the federal courts below, is reported at 836 P.2d 29 (1992). (Pet. App. 62a)

JURISDICTION

The decision of the court of appeals was entered February 26, 1993. A Petition for Rehearing with Suggestion for En Banc Rehearing was filed pursuant to Rules 35 and 40, Fed. R. App. P. That petition was treated as timely and denied on May 3, 1993. (Pet. App. 78a) The petition also was treated as timely by the clerk of this Court. (Pet. App. 79a) This Petition for Certiorari was filed July 28, 1993, and was granted September 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the constitutionality of a tax assessment under the Montana Dangerous Drug Tax Act,

Mont. Code Ann. §§ 15-25-101 through 123 (1987) (the "Montana Tax"). This tax is on the possession or storage of dangerous drugs including marijuana. The part of the tax at issue provides:

> "[T]he tax on possession and storage of dangerous drugs is the greater of: (a) 10% of the assessed market value of the drugs, as determined by the [Montana Revenue] department; or (b)(i) $100 per ounce of marijuana . . . "

The entire Montana Tax is set out in the Appendix to this Brief [hereinafter Brf. App.] at 1.

The provision of the United States Constitution involved in this case is the double jeopardy clause of the Fifth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . " (Pet. App. 86a)

STATEMENT OF THE CASE

The lower courts wrongly applied *United States v. Halper*, 490 U.S. 435 (1989) to an assessment under the Montana tax. *Halper* is a very unique, fact bound decision.[1] As the facts of this case show, *Halper* has no application here.

[1] Justice Kennedy, in a concurring opinion in *Halper*, stated the decision "is grounded in the nature of the sanction and the facts of the particular case". 490 U.S. at 504.

A. Overview of the Taxpayers' Marijuana Business.

In October 1987 Richard M. Kurth, Judith Kurth, Douglas M. Kurth, Rhonda I. Kurth, Clayton H. Halley, and Cindy Halley (the "Taxpayers"), operated a large marijuana growing business on their two wheat/cattle ranches (totalling about 3,500 acres) in Chouteau County, Montana, about 30 miles east of Great Falls, Montana.

The Taxpayers started growing marijuana about December 1985. They planned to pay off over two million dollars in mortgages on the ranches in a short time with the profits from growing marijuana. (Tr. Ex. 4 at 4) The ranches had a sophisticated marijuana factory designed to net over a million dollars each year. (Tr. at 93) They grew marijuana in a large metal building about 40 feet by 120 feet and in several other smaller buildings and attics. They dried the marijuana in a separate house trailer. It was a "cloning" factory with a continuous production line. (Tr. Ex. DD)[2]

[2] "Cloning" is a technique used to produce superior marijuana plants and insures that the resulting marijuana will have a uniform superior quality. A complete description of the cloning process is in the article, "Secrets of The High-Tech Growers Revealed", September 1987 issue of *High Times* magazine. (Tr. Ex. AA3 at 57.) The growing of marijuana is a major industry in the United States. *High Times* magazine is a monthly magazine devoted to this industry. That magazine contains articles on how to cultivate and use marijuana and advertisements for equipment. It also has a survey of the price paid for drugs in a column called "Trans-High Market Quotations." This column regularly publishes prices from around the country for marijuana, LSD, hashish, etc. which reflected the market price for

The Taxpayers harvested and sold five to ten pounds of marijuana every seven to ten days. The Taxpayers grew some of the best marijuana in Montana. (Tr. at 220-221) During the time they grew marijuana, the Taxpayers demanded an increasingly higher price from their purchasers. When arrested they received $1,800 per pound. Their final purchaser was paying $2,000 per pound to other growers for similar marijuana bud.[3] (Tr. at 93)

At a selling price of $1,800 to $2,000 per pound for marijuana bud at wholesale, the Taxpayers were nearly meeting their goal of paying off the mortgage. To net a $1 million per year required the production of about 550 pounds of marijuana bud each year or about 10 pounds each week. (Tr. at 93)

B. The Criminal Proceedings.

The criminal charges were filed against the Taxpayers in the Montana Twelfth Judicial District Court, Chouteau County on October 23, 1987. The Taxpayers made a series

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marijuana. (Tr. at 219.) This column shows that the price for marijuana varies with the quality, that is, the potency (how quickly it gets the user high) and the smokability (how easy it is to smoke).

[3] Like most commodities the wholesale price (price per pound) for marijuana is less per unit than the retail price (price per 1/4 ounce). An analysis of the mark-up shown in the prices in the "Trans-High Market Quotations" shows the per ounce price for marijuana when sold in ounce quantities was between 130% to 190% of the per ounce price when the marijuana is sold in pound quantities. This would give the Taxpayers' marijuana bud a retail price per ounce of $145 to $210 per ounce.

of plea agreements (Tr. Exh. A3, B2, C2, D2, E2, and F2) on March 25, 1988. They were sentenced on July 18, 1988.

Richard J. Kurth, the father, pled guilty to four felony charges.[4] The Montana District Court sentenced Richard Kurth to 20 years on Counts I, II, and III with 15 years suspended. He was sentenced to 5 years on Count IV. The sentences ran concurrently.[5] (Tr. Ex. 4, at 4-5)

Judith Kurth, Douglas M. Kurth, Rhonda I. Kurth, Clayton H. Halley, and Cindy Halley pled guilty to

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[4] The counts were:

Count I: Criminal sale of dangerous drugs, marijuana, in violation of Montana Law, section 45-9-101, MCA;

Count II: criminal possession of a dangerous drug, marijuana, with intent to sell, in violation of Montana Law, section 45-9-103, MCA;

Count III: solicitation to commit the offense of criminal possession of a dangerous drug, marijuana, with intent to sell, in violation of Montana Law, section 45-4-101; and,

Count IV: criminal possession of a dangerous drug, hashish, with intent to sell, in violation of Montana Law, section 45-9-103, MCA.

Tr. Ex. 4 at 1.

[5] On September 5, 1989, the Montana District Court sentenced him to serve an additional 5 years of the suspended sentence in prison because he lied during a subsequent trial of other parties. Trial Exhibit A-6.

conspiracy to possess with intent to sell.[6] Judith Kurth received a sentence of five years with four years suspended. (Tr. Ex. 5, at 4-5) Douglas Kurth received a twenty year suspended sentence. (Tr. Ex. 8) Rhonda Kurth received a three year deferred sentence. (Tr. Ex. 9) Clay Halley received a ten year suspended sentence. (Tr. Ex. 11) Cindy Halley received a three year deferred sentence. (Tr. Ex. 13)[7]

C. The Forfeiture.

Contemporaneous with the criminal proceedings, the Chouteau County Attorney filed a forfeiture action. The forfeiture action was resolved on March 25, 1988, at the same time as the criminal proceedings were resolved, when the Taxpayers signed a settlement agreement. (Brf.

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[6] They pled guilty to:

> Count I: Conspiracy to commit the offense of criminal possession of dangerous drug, marijuana, with intent to sell, a felony, in violation of Section 45-4-102, MCA, as charged in the information.

Tr. Ex. B2, C2, D2, E2, and F2, at 1. Since these Taxpayers were convicted only of conspiracy, double jeopardy was applied by the lower federal courts without all the Taxpayers being subject to all the elements of double jeopardy. The Court has "steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause." *Garrett v. United States*, 471 U.S. 773 (1985). For example, there is no double jeopardy prohibition where a defendant is prosecuted for a conspiracy offense and then later prosecuted in a second proceeding for the underlying substantive offense. See *United States v. Felix*, 112 S. Ct. 1377 (1992).

[7] The Taxpayers also paid a $20 surcharge for each felony pursuant to Mont. Code Ann. § 46-18-236, 1987.

App. 26) The total value of the property that the Taxpayers agreed to forfeit was $18,016.83 in cash and growing equipment which was sold by the sheriff for $400. (Brf. App. 11)

D. The Tax Assessments.

The tax assessment was divided by the Bankruptcy Court into three distinct tax assessments under the Montana Tax: 1) an assessment for harvested marijuana; 2) an assessment for live marijuana plants; and 3) an assessment for the hash or marijuana oil. (Pet. App. 37a-51a)

The assessment on the harvested marijuana was $181,100 for 1,811 ounces of marijuana. (Pet. App. 40a) At the time of arrest there was over 130 ounces of marijuana bud in plastic bags[8] (Tr. Ex. W; Tr. at 248) and about 78 ounces of loose marijuana bud. The Taxpayers also had a total of 100 pounds (1600 ounces) of marijuana stems and leaves in a large cardboard box. (Tr. Ex. DD; Tr. at 243)[9]

The tax on marijuana is 10% of the market value or $100 an ounce whichever is greater. The harvested

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[8] Apparently, these buds were ready for sale since the Taxpayers generally sold five to ten pounds of bud each seven to ten days. They sold the bud in 1/4 pound clear plastic bags.

[9] Stems and leaves of the type and quality of that seized at the Taxpayers' ranch was being sold in the Chouteau County area. (Tr. at 253-254) The marijuana eradication office for Montana testified that stems and leaves of the quality seized at the ranch were being sold and smoked in Montana. He placed a minimum wholesale value of $200 per pound on the stems and leaves and a retail value of $250 to $500 per pound. (Tr. at 131-132)

marijuana was assessed at $100 an ounce because the Taxpayers sold the marijuana for about $2,000 a pound and the highest retail market for marijuana in 1/4 ounce bags was about $400 an ounce. (Tr. Exh. AA4, at 26-27)

The tax assessment on the live marijuana plants included over two thousand marijuana plants varying in size from new cuttings several inches high to large "mother" plants several feet tall. (Tr. Exh. DD at 14-17) The Department made a tax assessment on the marijuana plants of $213,345 based on an estimated market value for marijuana plants. The Department also made an $224,000 tax assessment on marijuana oil.[10]

The Department first assessed the Taxpayers on December 8, 1987. (Tr. Ex. 19) A revised assessment was issued May 7, 1988. (Tr. Ex. 20) The Taxpayers timely filed a protest to these assessments and administrative proceedings began before the Department of Revenue to resolve the dispute. The Department appointed a hearing officer and both sides started discovery under the Montana Administrative Procedure Act, Mont. Code Ann. §§ 2-4-601, et seq.

F. The Bankruptcy Proceedings.

On September 8, 1988, the Taxpayers filed for bankruptcy in the United States Bankruptcy Court for the District of Montana, Great Falls Division, Cause No. 88-40629. The Department of Revenue filed a Proof of

[10] Marijuana oil is produced by heating marijuana in an organic solvent like alcohol and boiling down this solvent. It is put on regular cigarettes and smoked.

Claim on November 14, 1988, for $908,078.14 which included interest to date of filing.[11] On November 16, 1988, the Department filed a Motion for Relief from the Automatic Stay. The Bankruptcy Court denied the motion on January 31, 1989.

On February 14, 1989, the Department filed an Amended Proof of Claim. The Taxpayers filed a Combined Objection to Proof of Claim and Complaint to Determine Dischargeability of Indebtedness and for Declaratory and Injunctive Relief on May 2, 1989. This complaint created the adversary proceedings that are now before the Court.

An initial prehearing order was issued on May 22, 1989, in the adversary proceeding. The Department answered the complaint June 9, 1989. Following discovery and prehearing motions, a trial was held on March 27 and 28, 1990. After the submission of posthearing briefs, the Bankruptcy Court issued an Order and Judgement dated May 8, 1990. (Pet. App. 24a)

The Bankruptcy Court granted the Taxpayers' objection to the Department's claim for $864,940.99 pursuant to the Montana Tax and denied the Proof of Claim for that tax. The Bankruptcy Court held the assessments on the live marijuana plants and the marijuana oil were improper under Montana law. (Pet. App. 41a-48a and 60a) The Department did not appeal those two portions of that Order. Those two assessments are not before the Court.

[11] This proof of claim included a claim for $43,137.15 unpaid inheritance tax. That unpaid inheritance tax portion of the claim was not contested and is not a part of this case.

The Bankruptcy Court also held the assessment on the 1,811 ounces of harvested marijuana was proper according to Montana law and found a tax liability of $181,100. (Pet. 49-51a, App. 58a and 60a)[12] However, it ruled that the tax assessment on the harvested marijuana "constitutes double jeopardy to the Taxpayers, prohibited by the Fifth Amendment to the U. S. Constitution, pursuant to *U.S. v. Halper* . . . " (Pet. App, 60a)[13] The

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[12] The $208,150 cited in the decisions includes interest up to the date of the filing of the Department's proof of claim on the assessment of the 1,811 ounces of marijuana.

[13] The Bankruptcy Court rejected the Taxpayers remaining constitutional arguments:

> I reject Plaintiffs' alternative constitutional arguments dealing with excessive fines under the Eighth Amendment because the tax is not a fine in a criminal proceeding, *U.S. v. Sanchez*, 340 U.S. 42, 45 (1950), nor does it offend the due process or equal protection clauses in this tax case. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1980) (due process is not offended if the party contesting the tax is afforded an opportunity to challenge the tax before conclusive judgment); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); and *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) (State may impose different specific taxes upon different trades and professions and vary the rates). All drug dealers are treated equally under the Drug Tax Act, and such is a reasonable classification. Further, there is no unconstitutional delegation of the legislative powers to the D.O.R. to make a determination of market value. *Plum Creek Lumber Co. v. Hutton*, 171 Mont. 168, 557 P.2d 798 (1976). I finally reject Plaintiffs' argument under Article II, § 28 of the Montana Constitution and eminent domain as spurious.

Pet. App. 59-60a. The Taxpayers did not cross-appeal those portions of the Bankruptcy Court's decision.

Department timely appealed the portion of the Order disallowing the tax on the harvested marijuana and timely objected to the Referral of Appeal to Bankruptcy Appellate Panel on May 21, 1990. The case proceeded to the District Court.

Following submission of the record and briefs, the United States District Court affirmed the decision of the Bankruptcy Court in an Order dated April 23, 1991. (Pet. App. 139) The Department timely appealed the District Court decision to the Ninth Circuit Court of Appeals. The Circuit Court affirmed the decisions of the lower courts. (Pet. App. 1a)

SUMMARY OF ARGUMENT

Montana has a tax on marijuana of $100 an ounce. The Taxpayers owe $181,100 in tax because they possessed 1,811 ounces of marijuana. The Taxpayers operated a large marijuana growing business designed to net millions of dollars.

The double jeopardy provision of the Fifth Amendment does not apply to this case which involves a tax, not a civil sanction. The lower courts erred by applying *United States v. Halper*, 490 U.S. 435 (1989) to the tax assessment. In *Halper* the Court held that under the double jeopardy clause "a defendant who already has been punished in a criminal prosecution may not be subject to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 448-449. However, in *Halper*, the Court announced "a rule for the

rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449. Despite this admonition and a contrary decision by the Montana Supreme Court in *Sorenson v. State Dept. of Revenue*, 836 P.2d 29 (Mont. 1992) (Pet. App. 62a), the courts below wrongly applied *Halper* and found the Montana Tax was a civil sanction and the tax assessment violated the double jeopardy clause.

A. In order for the Court's decision in *Halper* to apply to the Montana Tax, the tax must be determined, as a matter of law, to be a penalty or civil sanction. The statute itself and the statement of legislative intent show the Montana Tax is not a civil sanction. It is an excise tax. The Montana legislature simply wanted to raise money when it enacted the tax. In *Sorenson*, the Montana Supreme Court specifically held the Montana tax on drugs was "an excise tax" and "not a multiple punishment and does not violate double jeopardy." *Id.* 836 P.2d at 33. (Pet. App. 73a). Courts of appeal in a half dozen other states have reached the same conclusion about their state's drug tax.

B. Two decisions by the Court, *United States v. Sanchez*, 340 U.S. 42 (1950), and *Minor v. United States*, 396 U.S. 87 (1969), held that a nearly identical federal tax of $100 an ounce on marijuana was a true excise tax and not a penalty. A tax "does not cease to be a valid tax measure . . . because the [taxed] activity is otherwise illegal." *Id.* 396 U.S. at 98. These decisions show that a tax of $100 an ounce on marijuana is not a penalty and is not disproportionate.

C. The Court's decision in *Halper* involved federal statutory penalties which contained no element of proportionality. The statutory penalty was based on what the Court found as "imprecise formulas" which had no relationship to the size of the penalized activity. Because of the lack of statutory formulas the federal penalty could lead to "sanctions overwhelmingly disproportionate to the damages." *Id.* 490 U.S. at 449. In contrast the Montana Tax has a definite statutory rate ($100 per ounce for marijuana) and a precise statutory formula which prevents overwhelmingly disproportionate tax assessments.

The Montana Tax supplied "funds for the youth evaluation program and chemical abuse aftercare programs," and "grants to youth courts to fund chemical abuse assessments and the detention of juvenile offenders in facilities separate from adult jails." Mont. Code Ann. § 15-25-122. This use of the drug tax revenue demonstrates the remedial, non-punitive purpose of the Montana Tax under the standards set by the Court in *United States v. Ward*, 448 U.S. 242 (1980) [hereinafter *Ward*]. In *Sorenson* the Montana Supreme Court also found the "tax has a remedial purpose other than promoting retribution and deterrence." *Id.* 836 P.2d at 31. (Pet. App. 69a)

D. The lower courts erred by subjectively distinguishing between "civil sanction" taxes, e.g., the Montana Tax, and "revenue-raising" taxes. In *Bob Jones University v. Simon*, 416 U.S. 725 (1974), the Court formally abandoned a prior series of decisions which divided taxes into "regulatory taxes" and "revenue-raising taxes." This subjective distinction had created a quagmire of conflicting decisions. To affirm the lower

federal courts' decisions in this case will create new subjective distinctions between "civil sanction taxes" and "revenue-raising taxes" and will lead to the same quagmire the Court faced prior to *Bob Jones University*.

ARGUMENT

A. The Montana Tax on Dangerous Drugs is Not a Civil Sanction.

At issue is the right of the states to tax – a central element of their sovereignty. "Power to tax for State purposes is as much an exclusive power in the State as the power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States is an exclusive power in Congress." *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 427 (1807).

The principle fault of the decisions of the lower courts is the equation of a tax to a civil sanction. While noting that "[a] state may legitimately tax criminal activities," the court of appeals went on to hold that a tax on criminal activities is a per se civil sanction:

> Where the case does involve a previous criminal conviction, however, special considerations come into play. Here, the most relevant consideration is the character of *the sanction* and whether it may fairly be called punitive in nature.

Kurth, 986 F.2d at 1311 (Pet. App. 9a) (emphasis supplied.) The holding that the Montana Tax was a civil sanction was done without any analysis of the statute

itself, the legislative intent, or the decisions of other courts.

1. The Montana Tax on dangerous drugs is a tax.

"The starting point in every case involving construction of a statute is the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). The statute imposing the tax, Mont. Code Ann. § 15-25-111 (1987), states:

> **15-25-111. Tax on dangerous drugs.** (1) There is a tax on the possession and storage of dangerous drugs. Except as provided in 15-25-112, each person possessing or storing dangerous drugs is liable for the tax. The tax imposed is determined pursuant to subsection (2). The tax is due and payable on the date of assessment. The department shall add an administration fee of 5% of the tax imposed pursuant to subsection (2) to offset costs incurred in assessing value, in collecting the tax, and in any review and appeal process.
>
> (2) With the exception that the tax on possession and storage of less than 1 ounce, 1 gram, or 100 micrograms of dangerous drugs must be that set forth below for 1 ounce, 1 gram, or 100 micrograms, the tax on possession and storage of dangerous drugs is the greater of:
>
> (a) 10% of the assessed market value of the drugs, as determined by the department; or
>
> (b) (i) $100 per ounce of marijuana, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;

(ii) $250 per ounce of hashish, as defined in 50-32-101, as determined by the aggregate weight of the substance seized;

(iii) $200 per gram of any substance containing or purported to contain any amount of a dangerous drug included in Schedule I pursuant to 50-32-222(1), (2), (4), and (5), or Schedule II pursuant to 50-32-224(1) through (4), as determined by the aggregate weight of the substance seized;

(iv) $10 per 100 micrograms of any substance containing or purported to contain any amount of lysergic acid diethylamide (LSD) included in Schedule I pursuant to 50-32-222(3), as determined by the aggregate weight of the substance seized;

(v) $100 per ounce of any substance containing or purported to contain any amount of an immediate precursor as defined under Schedule II pursuant to 50-32-224(5), as determined by the aggregate weight of the substance seized; and

(vi) $100 per gram of any substance containing or purported to contain any amount of dangerous drug not otherwise provided for in this subsection (2).

(3) The tax imposed under this section may be collected before any state or federal fines or forfeitures have been satisfied.

The Montana Tax is administered like other Montana taxes. Indeed, the tax, Mont. Code Ann. §§ 15-25-113, 114, and 115, incorporates by reference provisions from the Montana Individual Income Tax, Mont. Code Ann. §§ 15-30-101, et seq., the Montana Telephone Company

License Tax, Mont. Code Ann. §§ 15-53-101, et seq., and the normal Montana tax collection system.

2. The Montana legislature intended to create a tax.

The Montana "Dangerous Drug Tax Act" was published as 1987 Mont. Laws 563. That act, as passed by the legislature and signed by the Governor, contained a preamble. Under Montana practice, a statutory preamble is not ordinarily codified, but it does express the intent of the Montana legislature. The preamble to the Montana Drug Tax states:

> WHEREAS, dangerous drugs are commodities having considerable value, and the existence in Montana of a large and profitable dangerous drug industry and expensive trade in dangerous drugs is irrefutable; and
>
> WHEREAS, the state does not endorse the manufacturing of or trading in dangerous drugs and does not consider the use of such drugs to be acceptable, but it recognizes the economic impact upon the state of the manufacturing and selling of dangerous drugs; and
>
> WHEREAS, it is appropriate that some of the revenue generated by this tax be devoted to continuing investigative efforts directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana.
>
> THEREFORE, the Legislature of the State of Montana does not wish to give credence to the notion that the manufacturing, selling, and use

> of dangerous drugs is legal or otherwise proper, but finds it appropriate in view of the economic impact of such drugs to tax those who profit from drug-related offenses and to dispose of the tax proceeds through providing additional anti-crime initiatives without burdening law abiding taxpayers.

These legislative findings are supported by the Court.

> Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous.

United States v. Mendenhall, 446 U.S. 544, 561-562 (1980) (Powell, J., concurring in part and concurring in judgment.)

The motive for the Montana Tax is the same motive for all taxes by all legislatures – to raise money to pay for the costs of running the government. The legislative history of the tax lends further support for this motive. (Brf. App. 29)

The minutes of the committees which handled the bill which became the Montana Tax show that the legislators did not consider the Montana Tax a punishment. The prime sponsor of the tax, Representative Strizich, was directly asked whether the tax was a penalty or civil sanction. He answered:

> When you are talking about a penalty you are talking about a punitive measure and [he] thinks that would be entering a whole new ball game. We want to have the effect of a tax and, therefore, allow the fairness of our tax system to enter into this.

Montana Senate Taxation Committee Minutes, March 25, 1987. (Brf. App. 36) This intent is shown in other portions of the minutes. For example,

> Michael Murry told the Committee he represented 32 chemical dependent treatment centers in the state, and said revenue from such a tax would help in funding these programs.

Montana House Taxation Committee Minutes, March 5, 1987. (Brf. App. 29)

3. The Montana Supreme Court held the tax was not a sanction.

In *Sorenson* the Montana Supreme Court held that "the Montana Dangerous Drug Tax is an excise tax based on the quantity of drugs in the taxpayer's possession" *Id.* 836 P.2d at 33. (Pet. App. 72a) and "is not derived from a criminal conviction." *Id.* 836 P.2d at 32 (Pet. App. 71a) Finally, the Montana Supreme Court specifically held: "we hold Montana's Dangerous Drug Tax is not a multiple punishment and does not violate double jeopardy." *Id.* 836 P.2d at 33. (Pet. App. 73a)

Courts of appeal in other states have come to the same conclusion as the Montana Supreme Court and found their state taxes on drugs were taxes, not civil sanctions, and did not violate double jeopardy. *See, e.g., State v. Gallup*, 500 N.W.2d 437 (Iowa 1993); *Rehg v. Ill.*

Dept. of Revenue, 605 N.E.2d 525 (Ill. 1992); *State v. Riley*, 479 N.W.2d 234 (Wis. 1991); *Jackson v. Sharp*, 846 S.W.2d 144 (Tex. App. 1993).

B. Taxes on Illegal Items or Activities Are Not Sanctions – the Court's and Lower Federal Court Decisions on a Federal Tax on Marijuana Held It Was a Legitimate Tax.

Taxes on marijuana have been before this Court before.[14] In *United States v. Sanchez*, 340 U.S. 42, 45 (1950), the Court held that a similar federal tax of $100 per ounce on marijuana was a true tax and not a penalty: **"The tax in question [of $100 per ounce of marijuana] is a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect. . . ."** (The Marijuana Tax Act was last codified as 26 U.S.C. § 4741 et seq. (1954); it was repealed in 1971).

The history of *Sanchez*, the *Sanchez* decision itself, and subsequent federal court decisions show that *Sanchez*

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[14] In 1950 the federal marijuana tax was codified as I.R.C. § 2590 (1946):

> (a) Rate – There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms taxes at the following rates:
>
> (1) Transfers to special taxpayers – Upon each transfer to person who has paid the special tax and registered under sections 3230 and 3231, $1 per ounce of marihuana or fraction thereof.
>
> (2) Transfers to others – Upon each transfer to any person who has not paid the special tax and registered under sections 3230 and 3231, **$100 per ounce of marihuana or fraction thereof** . . .

overruled *Tovar v. Jareckie*, 173 F.2d 449 (7th Cir. 1949) which held the marijuana tax was a "penal statute."[15] See *Lassoff v. Gray*, 168 F. Supp. 363 (W.D. Ky., 1958) which recognized that *Sanchez* overruled *Tovar*.

The history of *Sanchez* is set out in the briefs filed by the United States Solicitor General in that case. The briefs demonstrate that the question of whether a tax of $100 per ounce on marijuana was a penalty or a tax was critical to the Court's *Sanchez* decision.[16]

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[15] The Seventh Circuit decision in *Tovar*, 173 F.2d at 451, mirrored the reasoning of the lower federal courts in this case: "We hold that *this section* of the statute under which this plaintiff was assessed *is a penal statute and not a tax statute.*" (emphasis supplied.)

[16] The statement of the case was:

> At the opening of the trial on March 28, 1950, appellees, relying on *Tovar v. Jarecki*, 173 F.2d 449, in which the Court of Appeals for the Seventh Circuit had held Section 2590(a)(2) to be **"a penal and not a revenue-raising statute * * * a penalty inflicted without a hearing and not a tax", moved to dismiss the complaint** (R. 6). The district court, apparently regarding the *Tovar* case as an authoritative holding that Section 2590(a)(2) is unconstitutional, granted the motion (R. 6), and an order was entered dismissing the complaint. (R.3.).

Brief of the United States at 2-3 (emphasis supplied).

The federal Marijuana Tax Act was before the Court a number of times after *Sanchez*. Although these cases involved the criminal sanctions in the federal Marijuana Tax Act, the Court's decisions affirmed the validity of the tax provisions in the law. For example, in *Buie v. United States*, decided with *Minor v. United States*, 396 U.S. 87 (1969), which involved the federal tax on marijuana, the Court stated:

> The dissent suggests that the courts should refuse to enforce § 4705(a) as part of a revenue measure . . . *A statute does not cease to be a valid tax measure* because it deters the activity taxed, because the revenue obtained is negligible, or *because the activity is otherwise illegal.*

Minor, 396 U.S. at 98 (emphasis added). The Court again upheld the validity of a $100 per ounce marijuana tax.

The federal marijuana tax was repealed effective May 1, 1971. The repealing statute, Pub. L. No. 91-513, 84 Stat. 1292, and the general savings statute found in 1 U.S.C. § 108, saved existing tax liabilities and liens under the Marijuana Tax Act. A number of taxpayers challenged outstanding assessments and liens under the Marijuana Tax Act as unconstitutional. The federal court decisions as a result of these challenges further emphasized that the federal tax of $100 per ounce on marijuana was a true tax and not a penalty.

For example, the marijuana tax was upheld in *Simmons v. United States*, 476 F.2d 715 (10th Cir. 1973).[17] In

[17] In that case the government sought to foreclose its tax lien for an unsatisfied marijuana excise tax assessment of **$483,200**. The trial court ruled for the federal government and against the taxpayer and his wife. Before judgment was entered the taxpayer died. Judgment was entered against the taxpayer's estate for marijuana tax and other liabilities totaling **$567,393.58**.

upholding the constitutionality of the marijuana excise tax, the Fifth Circuit held that the federal tax of $100 per ounce on marijuana was a valid civil excise tax. It stated:

> The *Sanchez* case was a suit for recovery of the $100 tax under the antecedent statute, § 7(a)(2) of the earlier Marihuana Tax Act, 50 Stat. 551. Collection was resisted on the ground that the statute levied an unconstitutional penalty and not a tax. **The Court held that imposition of the heavy liability was a legitimate exercise of the taxing power, despite its collateral regulatory purpose and effect and its severity as opposed to the $1 tax rate on transfers to registered persons. . . .**
>
> **Therefore, we conclude that the rationale of *Sanchez* is unimpaired and still sustains the tax as a valid civil liability. . . .**

Simmons, at 717-719.[18]

The Court should not impose on the states, through the Fourteenth Amendment, higher constitutional standards than those imposed on the federal government by

[18] Also, see the following cases which upheld the $100 an ounce marijuana tax and held it was not a penalty: *Frey v. United States*, 558 F.2d 270 (5th Cir. 1977); *United States v. Alvero*, 470 F.2d 981 (5th Cir. 1973); *Cancino v. United States*, 451 F.2d 1028, 196 Ct. Cl. 568, (1971) *cert. denied*, 408 U.S. 925, 92 S. Ct. 2504, 33 L. Ed. 2d 337 (1972); *Widdis v. United States*, 395 F. Supp. 1015 (1974).

the Bill of Rights. *Benton v. Maryland*, 395 U.S. 784 (1969). If a federal tax of $100 an ounce on marijuana is not a penalty, then a state tax of $100 an ounce on marijuana is not a penalty.

Federal excise taxes on unlawful activities or items are still quite common. For example, the National Firearms Act, 26 U.S.C. § 5801 et seq. (NFA) taxes the manufacture and transfer of certain firearms and destructive devices. In addition to the NFA's taxation and regulatory provisions, 18 U.S.C. § 922 prohibits certain persons from transferring or possessing certain types of firearms including firearms taxed under the NFA.

C. *Halper* Is Neither Applicable Nor Controlling

1. *Halper* involved fixed statutory penalty – Montana's drug tax is not a fixed statutory penalty.

In *Halper* the federal law in question, 31 U.S.C. §§ 3729-3731, (the False Claims Act) expressly provided a "*civil penalty* of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action" for each false claim. (emphasis added) There was no question that the law was a civil penalty.

The False Claim Act is violated by anyone who is not a member of the armed services of the United States and who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved." 31 U.S.C. § 3729. The $2,000

penalty per claim is in addition to an award of twice the amount of actual damages suffered by the federal government. There was no relationship between the amount of the penalty and Halper's activities.

In *Halper*, the federal government asked for a civil "penalty" of $130,000 under the False Claims Act in addition to the criminal penalties. As the federal district court stated:

> The Government seeks to recover $130,000, representing the $2,000 allotted by the statute for each of the 65 false claims set forth in the complaint. At most, however, the amount by which the 65 claims were inflated was $9.00 for each claim, or $585.

Halper, 660 F. Supp. at 533. The "penalty" of $130,000 was 222.22 times the maximum total amount of the false claims.

Those were the facts behind the Court's statement that the *Halper* decision established "a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449.

Under the False Claims Act, if the government could not prove other damages, a person who made a single false claim for $1 million would receive the same $2,000 civil penalty as the false claim for $9.00 made by Halper. The False Claims Act does not contain any element of rough proportionality. The formula for the penalty was extremely imprecise.

In contrast to the False Claim Act involved in *Halper*, the Montana Tax is a straight forward excise tax. As with other excise taxes the assessment is determined by the type and quantity of the tax item possessed. The more of the taxed item possessed the higher the tax. It is not a "fixed-penalty" based upon the mere possession. The Montana Tax has a precise formula for the assessment. The person who possesses one ounce of marijuana pays a tax of 10% of the market value of the marijuana or $100 whichever is more. These Taxpayers owe $181,100 in taxes because they possessed 1,811 ounces of marijuana.

The Court's recent decision in *Austin v. United States*, 113 S. Ct. 2801 (1993) and *Alexander v. United States*, 113 S. Ct. 2766 (1993) further explained the *Halper* decision. However, the holdings in those cases do not apply to this case. In those cases the Court held that statutory forfeitures were fines under the provision of the Eighth Amendment forbidding excessive fines. This case does not involve the excessive fines issue.

A general review of the facts of those cases shows that the equitable basis for those decisions also does not apply to this case. Because Austin pled guilty in state court to one count of possession of cocaine [two grams] with intent to distribute, the federal government wanted the forfeiture of Austin's body shop and mobile home pursuant to 21 U.S.C. §§ 881(a)(4) and 881(a)(7) (1988). That property, which was worth about $40,000, was almost all of the property he had. (Austin's Brief at 4-5)

The Court decided *Alexander* on the same day as *Austin*. In that case Alexander was convicted of 17 obscenity counts and 3 counts of violating RICO. 18

U.S.C. § 1961 "As a basis for the obscenity and RICO convictions, the jury determined that four magazines and three videotapes were obscene." *Id.* 119 S. Ct. at 2770. For this offense the United States Government sought the forfeiture of Alexander's wholesale and retail adult entertainment businesses and about $9 million.

The fault with the statutory penalties and forfeitures in *Halper*, *Austin*, and *Alexander* lay in what the Court called the "imprecise formulas" of the statutes. As written they were not tied in some manner to the size of the criminal activity. The lack of legislative guidelines lead to the possibility of constitutionally disproportionate punishment or double punishment.

2. Unlike the penalty in *Halper*, the Montana Drug Tax is not disproportionate.

There is no authority that a tax must be proportional just as there is no authority, apart from lower court decisions in this case, that a tax is a civil sanction. Despite this lack of authority the court of appeals required Montana to show proportionality. "The record in this case, however, is devoid of information necessary to make a determination of proportionality." *Kurth*, 986 F.2d at 1312. (Pet. App. 10a) The court of appeals required Montana to offer "evidence justifying its imposition of the tax." *Id.* 986 F.2d at 1312. (Pet. App. 11a) The decision ignores the express language of the Montana Tax which makes the tax proportional.

The Montana Tax has an expressed tax rate for the possession of drugs. In this case the rate is $100 per ounce

of marijuana. The Montana Drug Tax has an expressed statutory proportionality.

The Montana Supreme Court in *Sorenson*[19] found the Montana Tax was not grossly disproportionate:

> Finally, respondents contend the tax was excessive. Sorenson was assessed a tax of $200 per gram, or $4,216 for his possession of 21.08 grams of cocaine. Similarly, Williams was assessed a tax of $100 per ounce, or $1,260 for his possession of 12.6 ounces of marijuana. We do not conclude that this tax is excessive. It is neither a fixed penalty as in *Halper*, nor is the amount of tax so grossly disproportionate as to transform this tax into a criminal penalty which violates double jeopardy. We also note the rates of tax on various drugs are comparable to those of other states and also comparable to the amounts in effect for many years during the effective period of the Federal Drug Tax Act which has now been repealed.

Id. 836 P.2d at 33.

For example, under the Montana Tax cocaine is taxed at $200 per gram. Mont. Code Ann. § 15-25-111(2)(iii) (1987). In Montana a person such as Austin who had two grams of cocaine would be assessed a total drug tax of $400. A tax of $400 is far, far smaller than the forfeiture of a mobile home and auto body shop worth about $40,000.

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[19] *Sorenson* combined two separate appeals: *Sorenson v. State, Department of Revenue* and *Department of Revenue v. Williams*.

Most of the 27 states that tax drugs, tax marijuana at $100 an ounce. This tax rate probably came from the $100 an ounce tax in the federal tax which was upheld by the Court in 1950 in *Sanchez*. A tax of $100 an ounce in 1950 dollars would equal a tax of $472 in 1987 dollars.[20] Therefore, the Montana tax on marijuana is about one-fifth the rate of the federal tax on marijuana which was approved by federal courts.

The fact that the Montana Drug Tax might deter the taxed activity does not effect the validity of the tax. In *Alaska Fish Co. v. Smith*, 235 U.S. 44 (1921) an excise tax designed to stop the use of herring for fish oil, fertilizer, and fish meal was sustained. The Court held:

> Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk . . . We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation.

Id. 235 U.S. at 48-49.

3. The Montana Drug Tax is remedial.

Even if the Court were to subject the Montana Tax to stricter scrutiny than that given taxes on legal activity, the tax assessment would be valid. One of the tests used in determining if a "sanction" violates the double jeopardy clause, is whether "the second sanction may not fairly be

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[20] *Statistical Abstract of the United States*, 110 Ed., U.S. Department of Commerce, Bureau of the Census, p. 467.

characterized as remedial, but *only* as a deterrent or retribution." *Halper* at 502 (emphasis added). The Montana Tax passes this test.

Like many excise taxes, the Montana Tax provides how Montana will spend the revenue from the tax.[21] The 1987 law, Mont. Code Ann. § 15-25-122, provided:

> **Disposition of proceeds.** (1) The department shall transfer all taxes collected pursuant to this chapter, less the administration fee authorized in 15-25-111(1), to the state treasurer on a monthly basis.
>
> (2) The state treasurer shall deposit one-third of the tax to the credit of the department of family services to be used for the youth evaluation program and chemical abuse aftercare programs.
>
> (3) The treasurer shall credit the remaining two-thirds of the tax proceeds as follows:
>
> (a) 85% to the department of justice to be used for grants to youth courts to fund chemical abuse assessments and the detention of juvenile offenders in facilities separate from adult jails; and
>
> (b) 15% to the special law enforcement assistance account created in 44-13-101 for the activities described in 44-13-103.

---

[21] There of course is no need for a tax to be remedial. The Court has repeatedly held:

> [T]here is no requirement . . . the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. . . . A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 623 (1981).

In *Sorenson* the Montana Supreme Court found the Montana Tax had a remedial purpose:

> Next, the tax has a remedial purpose other than promoting retribution and deterrence. Section 15-25-122, MCA, earmarks the use to the tax funds collected to defray the costs of drug abuse. The tax collected is used for such things as youth evaluations, chemical aftercare, chemical abuse assessments and juvenile detention facilities. The tax collected is based on the quantity of drugs possessed or stored by the taxpayer, and is not excessive in relation to the remedial purposes addressed in § 15-25-122, MCA.

Id. 836 P.2d at 31. (Pet. App. 69a).

The Montana Drug Tax was designed to pay for only a very small part of the costs of drugs, including marijuana, to society. "Possession use, and distribution of illegal drugs represents 'one of the greatest problems affecting the health and welfare of our population.' " *Harmelin v. Michigan*, 115 L. Ed. 2d 836, 870 (1991) (Kennedy, J., concurring.) (Quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 688 (1989)).

What is "remedial" was clarified by the Court in *United States v. Ward*, 448 U.S. 242 (1980). That case involved penalties under the Federal Water Pollution

Control Act (FWPCA). 33 U.S.C. § 1251. The Court held that a federal fine of up to $250,000 per offense imposed for failure to notify officials of an oil spill was a civil sanction, not a criminal penalty, and did not violate the double jeopardy provision of the Constitution. The fine was in addition to payment for the costs of cleanup. The Court indicated that laws designed to compensate for "damages sustained by society" were remedial. *Ward*, 448 U.S. at 254. *Halper* did not overrule *Ward*.

The Montana Tax funds "youth evaluation programs and chemical abuse aftercare programs," "grants to youth courts to fund chemical abuse assessments and detention of juvenile offenders in facilities separate from adult jails," and "the special law enforcement assistance account." Mont. Code Ann. § 15-25-122 (1987). It has solely a "nonpunitive purpose" within the meaning of *Halper*. Having solely a nonpunitive purpose the Montana Tax is not a sanction.

D. Subjectively Dividing Taxes into "Civil Sanction Taxes" and "Revenue Raising Taxes" Would Create a Quagmire.

In the 1920's to avoid the restrictions of the Anti-Injunction Act, the Court divided taxes into two classes: "revenue-raising taxes" which were subject to the Anti-Injunction Act; and "regulatory taxes" which were not subject to the Anti-Injunction Act. See *Hill v. Wallace*, 259 U.S. 44 (1922); *Lipke v. Lederer*, 259 U.S. 557 (1922); *United States v. Constantine*, 296 U.S. 287 (1925); *Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922). Using this distinction the Court avoided the restrictions of the Anti-Injunction Act

and struck down a number of "regulatory taxes." The history of this distinction was set out by the Court in the *Bob Jones University* case.

The inherent problems created by the distinction between regulatory and revenue-raising taxes was apparent from the beginning and prompted vigorous dissents and contradictory decisions. Compare *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932) with *Sonzinsky v. United States*, 300 U.S. 506 (1937). Finally, in *Bob Jones University* the Court expressly held: "the Court has also *abandoned* the view that bright-line distinctions exist between regulatory and revenue-raising taxes." *Id.* 416 U.S. at 743 n.17 (emphasis added). Indeed, the Court emphasized that point in *Bob Jones University* by stating it twice:

> In support of its argument that this case does not involve a "tax" within the meaning of § 7421(a) [the Anti-Injunction Act], petitioner cites such cases as *Hill v. Wallace*, 259 U.S. 44 (1922) (tax on unregulated sales of commodities futures), and *Lipke v. Lederer*, 259 U.S. 557 (1922) (tax on unlawful sales of liquor. It is true that the Court in those cases drew what it saw at the time as distinctions between regulatory and revenue-raising taxes. But the Court has subsequently abandoned such distinctions. *E.g.*, *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937).

Id. 416 U.S. at 743 n.12.

If the Court adopts the distinction created by the lower federal courts in this case between "sanction taxes" and "revenue-raising taxes", it will reopen the door closed by its decision in *Bob Jones University* and recreate the quagmire.

The philosophical basis for taxing illegal activity was set forth in Justice Cardozo's dissenting opinion, joined by Justice Brandeis and Justice Stone, in *United States v. Constantine*, 296 U.S. 287, 297-298 (1925):

> Congress may reasonably have believed that, in view of the attendant risks, a business carried on illegally and furtively is likely to yield larger profits than one transacted openly by law-abiding men. Not repression, but payment commensurate with the gains is thus the animating motive. * * * Congress may also have believed that the furtive character of the business would increase the difficulty and expense of the process of tax collection. The Treasury should have reimbursement for this drain on its resources. Apart from either of these beliefs, Congress may have held the view that an excise should be so distributed as to work a minimum of hardship; that an illegal and furtive business, irrespective of the wrongdoing of its proprietor, is a breeder of crimes and a refuge of criminals; and that in any wisely ordered polity, in any sound system of taxation, men engaged in such a calling will be made to contribute more heavily to the necessities of the Treasury than men engaged in a calling that is beneficent and lawful.

Thus viewed, the statute was not adopted to supplement or sanction the police powers of the states or their subdivisions. It was adopted, for

anything disclosed upon its face or otherwise, as an appropriate instrument of the fiscal policy of the nation. The business of trading in things contraband is not the same as the business of trading in legitimate articles of commerce. Classification by Congress according to the nature of the calling affected by a tax (*State Board of Tax Commissioners v. Jackson*, 283 U.S. 527) does not cease to be permissible because the line of division between callings to be favored and those to be reproved corresponds with a division between innocence and criminality under the statutes of a state * * * By classifying in such a mode Congress is not punishing for a crime against another government. It is not punishing at all. It is laying an excise upon a business conducted in a particular way with notice to the taxpayer that if he embarks upon that business he will be subjected to a special burden. What he pays, if he chooses to go on, is a tax and not a penalty.

The general constitutional limits the Court has placed on state taxation are sufficient to protect Taxpayers from abuse of a constitutional nature by state taxes. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Com. of Webster County*, 109 S. Ct. 633 (1989). So long as the Montana Tax does not violate the normal constitutional limits, the Court should not affirm the lower courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL VAN TRICHT*
DAVID W. WOODGERD
Special Assistant Attorneys General
Office of Legal Affairs
Department of Revenue of the State of Montana
P.O. Box 202701
Helena, Montana 59620-2701
(406) 444-2460

Attorneys for Petitioner, Department of Revenue of the State of Montana

*Counsel of Record

November 1993

CHAPTER NO. 563

[HB 791]

AN ACT ESTABLISHING A TAX ON THE POSSESSION AND STORAGE OF DANGEROUS DRUGS; PROVIDING FOR THE ASSESSMENT AND COLLECTION OF THE TAX; GRANTING RULEMAKING AUTHORITY TO THE DEPARTMENT OF REVENUE; PROVIDING FOR FUNDING OF THE ADMINISTRATION OF THE TAX; STATUTORILY APPROPRIATING THE ADMINISTRATIVE FUNDING; PROVIDING FOR DISPOSITION OF THE TAX COLLECTED; AND AMENDING SECTION 17-7-502, MCA.

WHEREAS, dangerous drugs are commodities having considerable value, and the existence in Montana of a large and profitable dangerous drug industry and expensive trade in dangerous drugs is irrefutable; and

WHEREAS, the state does not endorse the manufacturing of or trading in dangerous drugs and does not consider the use of such drugs to be acceptable, but it recognizes the economic impact upon the state of the manufacturing and selling of dangerous drugs; and

WHEREAS, it is appropriate that some of the revenue generated by this tax be devoted to continuing investigative efforts directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana.

THEREFORE, the Legislature of the State of Montana does not wish to give credence to the notion that the manufacturing, selling, and use of dangerous drugs is legal or otherwise proper, but finds it appropriate in view of the economic impact of such drugs to tax those who

profit from drug-related offenses and to dispose of the tax proceeds through providing additional anticrime initiatives without burdening law abiding taxpayers.

Be it enacted by the Legislature of the State of Montana:

Section 1. **Short title**. This act may be cited as the "Dangerous Drug Tax Act".

Section 2. **Definitions**. As used in [this act], unless the context requires otherwise, the following definitions apply:

(1) "Dangerous drug" has the meaning provided in 50-32-101.

(2) "Department" means the department of revenue provided for in 2-15-1301.

(3) "Person" means an individual, firm, association, corporation, partnership, or any other group or combination acting as a unit.

Section 3. **Tax on dangerous drugs**. (1) There is a tax on the possession and storage of dangerous drugs. Except as provided in [section 4], each person possessing or storing dangerous drugs is liable for the tax. The tax imposed is determined pursuant to subsection (2). The tax is due and payable on the date of assessment. The department shall add an administration fee of 5% of the tax imposed pursuant to subsection (2) to offset costs incurred in assessing value, in collecting the tax, and in any review and appeal process.

(2) The tax on possession and storage of dangerous drugs is the greater of:

(a) 10% of the assessed market value of the drugs, as determined by the department; or

(b) (i) $100 per ounce of marijuana, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;

(ii) $250 per ounce of hashish, as defined in 50-32-101, as determined by the aggregate weight of the substance seized;

(iii) $200 per gram of any substance containing or purported to contain any amount of a dangerous drug included in Schedule I pursuant to 50-32-222(1), (2), (4), and (5), or Schedule II pursuant to 50-32-224(1) through (4), as determined by the aggregate weight of the substance seized;

(iv) $10 per 100 micrograms of any substance containing or purported to contain any amount of lysergic acid diethylamide (LSD) included in Schedule I pursuant to 50-32-222(3), as determined by the aggregate weight of the substance seized;

(v) $100 per ounce of any substance containing or purported to contain any amount of an immediate precursor as defined under Schedule II pursuant to 50-32-224(5), as determined by the aggregate weight of the substance seized; and

(vi) $100 per gram of any substance containing or purported to contain any amount of dangerous drug not otherwise provided for in this subsection (2).

(3) The tax imposed pursuant to this section must be collected only after any state or federal fines or forfeitures have been satisfied.

Section 4. **Exemptions**. The tax imposed pursuant to [section 3] does not apply to any person authorized by state or federal law to possess or store dangerous drugs. The burden of proof of an exemption from [section 3] is on the person claiming it.

Section 5. **Administration and enforcement – department rules.** (1) All law enforcement personnel and peace officers shall promptly report each person subject to the tax to the department, together with such other information which the department may require, in a manner and on a form prescribed by the department.

(2) The deficiency assessment provisions of 15-53-105, the civil penalty and interest provisions of 15-53-111, the criminal penalty provisions of 15-30-321(3), the estimation of tax provisions of 15-53-112, and the statute of limitations provisions of 15-53-115 apply to this tax and are fully incorporated by reference in this chapter. The department may adopt such rules as are necessary to administer and enforce the tax.

Section 6. **Tax appeal**. A person aggrieved by an assessment pursuant to [section 3] or an exemption decision pursuant to [section 4] may appeal the assessment or exemption decision pursuant to Title 15, chapter 2, part 3.

Section 7. **Warrant for distraint**. If all or part of the tax imposed by this chapter is not paid when due, the department may issue a warrant for distraint as provided in Title 15, chapter 1, part 7. The resulting lien shall have precedence over any other claim, lien, or demand thereafter filed and recorded.

Section 8. **Accounts**. (1) There is an institutions evaluation special revenue account within the state treasury. One-half of the taxes collected under [section 9] shall be deposited in the account.

(2) There is a chemical abuse assessment special revenue account within the state treasury. One-half of the taxes collected under [section 9] shall be deposited in the account.

Section 9. **Disposition of proceeds**. (1) The department shall transfer all taxes collected pursuant to [this act], less the administrative fee authorized in [section 3(1)], to the state treasurer on a monthly basis.

(2) The state treasurer shall deposit one-half of the tax to the credit of the department of institutions to be used for the youth evaluation program and chemical abuse aftercare programs.

(3) The treasurer shall credit the remaining one-half of the tax proceeds as follows:

(a) 85% to the department of justice to be used for grants to youth courts to fund chemical abuse assessments and the detention of juvenile offenders in facilities separate from adult jails; and

(b) 15% to the special law enforcement assistance account created in 44-13-101 for the activities described in 44-13-103.

Section 10. **Special revenue account**. (1) There is created a special revenue fund to be called the dangerous drug tax administration fund.

(2) All administrative fees collected under [section 3(1)] shall be deposited by the department into the dangerous drug tax administration fund.

(3) The money in the dangerous drug tax administration fund may be expended by the department to administer the tax and pay any refund required by this chapter.

(4) The appropriation made in subsection (3) is a statutory appropriation as provided in 17-7-502.

Section 11. Section 17-7-502, MCA, is amended to read:

"**17-7-502. Statutory appropriations – definition – requisites for validity**. (1) A statutory appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the need for a biennial legislative appropriation or budget amendment.

(2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both of the following provisions:

(a) The law containing the statutory authority must be listed in subsection (3).

(b) The law or portion of the law making a statutory appropriation must specifically state that a statutory appropriation is made as provided in this section.

(3) The following laws are the only laws containing statutory appropriations:

(a) 2-9-202;
(b) 2-17-105;

(c) 2-18-812;
(d) 10-3-203;
(e) 10-3-312;
(f) 10-3-314;
(g) 10-4-301;
(h) 13-37-304;
(i) 15-31-702;
(j) 15-36-112;
(k) 15-70-101;
(l) 16-1-404;
(m) 16-1-410;
(n) 16-1-411;
(o) 17-3-212;
(p) 17-5-404;
(q) 17-5-424;
(r) 17-5-804;
(s) 19-8-504;
(t) 19-9-702;
(u) 19-9-1007;
(v) 19-10-205;
(w) 19-10-305;
(x) 19-10-506;
(y) 19-11-512;
(z) 19-11-513;
(aa) 19-11-606;
(bb) 19-12-301;
(cc) 19-13-604;
(dd) 20-6-406;
(ee) 20-8-111;
(ff) 23-5-612;
(gg) 37-51-501;
(hh) 53-24-206;

(ii) 75-1-1101;
(jj) 75-7-305;
(kk) 80-2-103;
(ll) 80-2-228;
(mm) 90-3-301;
(nn) 90-3-302;
(oo) 90-15-103;
(pp) Sec. 13, HB 861, L. 1985; *and*
(qq) [section 10].

(4) There is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing, paying, and securing all bonds, notes, or other obligations, as due, that have been authorized and issued pursuant to the laws of Montana. Agencies that have entered into agreements authorized by the laws of Montana to pay the state treasurer, for deposit in accordance with 17-2-101 through 17-2-107, as determined by the state treasurer, an amount sufficient to pay the principal and interest as due on the bonds or notes have statutory appropriation authority for such payments."

Section 12. **Codification instruction**. Sections 1 through 10 are intended to be codified as an integral part of Title 15, and the provisions of Title 15 apply to sections 1 through 10.

Approved April 20, 1987.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; and CLAYTON H. and CINDY K. HALLEY, husband and wife; Debtors. ROBERT G. DRUMMOND, Trustee; Plaintiff, - vs - COUNTY OF CHOUTEAU, a political subdivision of the State of Montana, Defendants.	Case No. 88-40629-JLP-11 ADVERSARY PROCEEDING No. 90/00245

* * *

ORDER

* * *

At Butte in said District on this 6th day of February, 1991,

Upon Motion of the Montana Department of Revenue, and good cause having been shown,

IT IS HEREBY ORDERED that the Montana Department of Revenue, shall transfer $17,297.66 in funds confiscated from the debtors' account with Dain Bosworth on January 20, 1988, to Chouteau County, Montana, as per this Court's Order in this proceeding dated January 4, 1991.

JOHN L. PETERSON
JOHN L. PETERSON
United States Bankruptcy Judge
P.O. Box 689
Butte, Montana 59703

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re KURTH RANCH, KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; and CLAYTON H. and CINDY K. HALLEY, husband and wife; Debtors. ROBERT G. DRUMMOND, Trustee, Plaintiff, -vs- COUNTY OF CHOUTEAU, a political subdivision of the State of Montana, Defendant.	Case No. 88-40629-11 Adversary Proceeding No. 90/00245

ORDER

At Butte in said District this 4th day of January, 1991.

In this adversary proceeding, the Trustee has filed a Complaint against the Defendant Chouteau County seeking turnover of cash in the sum of $18,016.83 and items of personal property which were taken into possession by the Defendant under the Montana Uniform Controlled Substances Act, Section 44-12-101, et seq. Mont. Code

Ann. After Answer, the parties have submitted the matter to the Court on an agreed Statement of Facts and each party has filed a Motion for Summary Judgment. I also note that Chouteau County has filed a Proof of Claim in the bankruptcy case for the amount of $18,016.83 plus the equipment sought to be recovered in this proceeding. Plaintiff cites jurisdiction under 28 U.S.C. § 157 and 11 U.S.C. § 1334. The turnover is sought under 11 U.S.C. § 542, claiming each item of property is an asset of the bankruptcy estate under 11 U.S.C. § 541(a).[1]

The agreed facts show that on December 3, 1987, the Defendant County, acting pursuant to Section 44-12-102, Mont. Code Ann., filed a "Petition For Forfeiture" in the Montana Twelfth Judicial District court against $28,260.26 and miscellaneous cultivation equipment as an *in rem* proceeding. The Petition alleges that the currency and equipment, all seized pursuant to search warrants, were fruits of an illegal marijuana growing operation, and therefore subject to forfeiture under Section 44-12-102, Mont. Code Ann. The Petition and Summons were served upon Debtors Douglas, Rhonda, William, Judith and Richard Kurth, and Clay and Cindy Halley and non-debtor Norwest Bank. On January 4, 1988, a verified Answer to the Petition was filed by all parties except Norwest Bank, which never appeared in said action.

On March 14, 1988, the parties in the forfeiture action filed a stipulation that hearing on the forfeiture would be

[1] The Trustee has not sought to invoke 11 U.S.C. § 549 dealing with post-petition transactions or transfers, although the facts indicate the possibility of a post-petition transfer under the Trustee's theory of title to the property.

postponed until resolution of criminal charges which had been filed against Kurths and Halleys. After the stipulation was approved by the state court, the parties negotiated an agreement and filed in the state court on October 6, 1988, a "Stipulation Re Forfeiture", whereby the county was allowed to enter a Judgment and Order of Forfeiture on October 28, 1988, which forfeited to the State of Montana for distribution to law enforcement agencies the sum of $18,016.83 cash and all drug-related paraphernalia. The balance of the cash which had been seized was released to the Kurths and Halleys, subject to potential liens asserted by the Montana Department of Revenue and other creditors. Before the Stipulation and Judgment on forfeiture had been filed and entered, the Debtors Kurth and Halley filed a Chapter 11 Petition in bankruptcy on September 9, 1988. The record shows the Defendant County never filed a Motion For Relief of the Automatic Stay under 11 U.S.C. §362(d) and had taken no action to either sell the forfeited equipment or utilize the cash of $18,016.83, because of the automatic stay. Instead, according to the Brief of the County, the County filed a Proof of Claim in the Chapter 11 case, as described above.[2] The Trustee Plaintiff was appointed in the Chapter 11 case on December 19, 1988, and commenced this adversary proceeding under Bankruptcy Rule 7001 on September 6, 1990. Defendant county for its defense to the Complaint asserts the property seized is not property of the estate.

[2] By reason of the decision in this case, the County's Proof of Claim is subject to disallowance under § 502(d). *In the Matter of Eye Contact, Inc.*, 97 B.R. 990 (Bankr. W.D. Wisc. 1989).

The issue before the Court is whether the cash and drug equipment were property of the estate under § 541(a) of the Bankruptcy code on the date the Chapter 11 Petition was filed. At the outset, I note the Debtors' bankruptcy Schedules and Statement of Affairs fail to list the pending County forfeiture action and Debtors-In-Possession never sought bankruptcy Court approval to sign and file the "Stipulation Re Forfeiture," which was filed post-petition. The State of Montana Department of Revenue filed a Motion for Relief of the Automatic Stay based, however, upon a wholly separate state statute called the Montana "Dangerous Drug Tax Act," Section 15-25-101, et seq. Mont. Code Ann. The seizure of the cash and goods was discussed at the § 341 First Meeting of Creditors in relation to the accounts which the Debtors owned at Waddell & Reed and Dain Bosworth, which had been seized by Chouteau County.

The contention of the Defendant County is that title to the property seized by warrant relates back to date of seizure or the date of the criminal act, citing *U.S. v. Stowell*, 133 U.S. 1, 10 S.Ct. 244, 33 L.Ed. 555 (1890); *Texas v. Donoghue*, 302 U.S. 284, 58 S.Ct. 192, 82 L.Ed.2d 264 (1937); *Stout v. Green*, 131 F.2d 995 (9th Cir. 1942); *U.S. v. Bissell*, 866 F.2d 1343 (11th Cir. 1989); *In re Reid*, 60 B.R. 301 (Bankr. Md. 1986); *In re Ryan (I)*, 15 B.R. 514 (Bankr. Md. 1981); and *In re Ryan (II)*, 32 B.R. 794 (Bankr. Md. 1983). The Trustee, recognizing the relation back rule in forfeiture cases, argues that such doctrine is based upon express statutory language, such as contained in 21 U.S.C. Section 881(h) that title vests in the United States "upon commission of the act giving rise to forfeiture under this section" and the Maryland statute which states

that upon forfeiture, no property right shall exist in each property and title shall immediately vest in Baltimore City or County. Md. Code 1957, Art. 27, § 297(a)(6). By contrast, the Trustee argues, the Montana statute does not contain such express statutory language, and by reason of the procedure set forth under the Montana Act, forfeiture occurs only upon judgment by the state district court, which did not occur before commencement of the case.

This case involves an interpretation of the Uniform Controlled Substance Act (Act), adopted by Montana in 1979, with certain modifications. *See*, Am. Jur. 2d, *Desk Book*, Item No. 124 (Cum. Supp. 1990). The Act was designed to supplement the Uniform Narcotic Drug Act and Model State Drug Abuse Control Act to achieve uniformity between the laws of the several states and those of the federal government. 25 Am. Jur. 2d, *Drugs, Narcotics and Poisons*, Sec. 27.5 (Cum. Supp. 1990). According to the Commissioners' Prefatory Note to Uniform Controlled Substances Act, the act was designed to complement the new federal narcotic and dangerous drugs legislation (21 U.S.C. 801 et seq.) and provide an interlocking trellis of federal and state law to enable government at all levels to more effectively control the drug abuse problem. Under the Act, the uniform law makes subject to forfeiture (1) all controlled substances; (2) all raw materials, equipment or property used in any part of the drug process; (3) all property used as a container for the drug property; (4) all conveyances used to transport the drug property and (5) all books and records used in violation of the act. Uniform Controlled Substances Act § 505(a). As a general rule, forfeiture statutes

service the ends of law enforcement by preventing further illicit use of the property and by imposing an economic penalty, thereby rendering illegal behavior unprofitable. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687, 94 S.Ct. 2080, 2094, 40 L.Ed. 2d 452 (1974). The Montana statute, §44-12-102, does the same, except that it makes certain exception to conveyances, which is not an issue in this proceeding. The Montana procedural sections dealing with any forfeiture must be scrupulously followed as to notice of seizure and service of the forfeiture complaint as a due process requirement. *State of Montana v. 1978 LTD II and Henderson*, ___ Mont. ___, 701 P.2d 1365 (1985). The Montana statute provides there is a rebuttable presumption of forfeiture, § 44-12-203, so that the presumed owner of the property has the right to defend at a forfeiture hearing that the property was not used for the illegal purpose, that the use of the property occurred without his knowledge or consent, or that the claimant of a security interest has a bona fide security interest in the property, vested after reasonable investigation as to the moral character of the owner and without knowledge of illegal purpose of use. After the hearing on forfeiture, if the court finds the property was used for the illegal use, it shall order it disposed, first, to a bona fide security claimant, and then to the confiscating agency for its official use or sale. § 44-12-205. The proceeds of the confiscated property must be used by the particular local or state agency for enforcement of drug laws. § 44-12-206. Section 44-12-205(2)(a) expressed the rights of secured claimants "as of the date of seizure, it being the purpose of this Chapter to forfeit only the right title or interest of the owner." The scheme of the Montana Act, as well as

the Uniform Act, is therefore clear. The seizure takes place by the law enforcement official, either with or without warrant, after which a Petition is filed in district court to allow owners and other claimants of the property to defend on one of three grounds above described. Upon finding of the right to seizure based on illegal use of the property, the court then orders disposition of property, either in kind, by sale or transfer to the respective law enforcement agencies, or to an innocent claimant. The ultimate issue in the case *sub judice* is when does title transfer to the seized property.

It is clearly federal law since *United States v. Stowell*, supra, that:

> "By settled doctrine of this court, whenever a statute enacts that upon commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienation, even to purchasers in good faith." *Id.* at 16-17.

It is noteworthy that the federal statute involved in *Stowell*, set forth in the margin of the case, merely stated that the illegal distilling apparatus "shall be forfeited." The *Stowell* case has been followed consistently in forfeiture cases. *See, e.g. Simons v. United States*, 541 F.2d 1351 (9th

Cir. 1976); and *Ivers v. United States*, 581 F.2d 1367 (9th Cir. 1978).

I see no reason, particularly in view of the legislative scheme of the Montana Act, that the *Stowell* doctrine should not be applied in this case. I find support in this holding from several sources. First, under a similar Washington law on forfeiture in a drug case, the court in *Lowery v. Nelson*, 43 Wash. App. 747, 719 P.2d 594, 596 (1986), citing federal decisions, states:

> "These courts have concluded that government's right to seize and forfeit a vehicle vests at the time of the illegal conduct. That right may be executed later by physical seizure of the vehicle, so no warrant is required to perfect the forfeiture. The same reasoning applies to the Washington forfeiture statute * * * ."

Second, as stated in *Ivers*, supra, at 1367, and which principle was affirmed in *State v. 1978 LTD II*, supra, the forfeiture right of immediate vesting "must be 'defined and consummated' by the judgment of decree of a court" to satisfy constitutional requirements of notice and opportunity to be heard. The Montana statute fulfills that requirement. Since that is the purpose of the procedural provision of the Act, the Trustee's argument that title vests at the date of the judgment is misplaced. Third, the holding of *In re Reid*, supra, interpreting the Debtor's property right pursuant to § 541 of the Bankruptcy Code vis-a-vis the Maryland forfeiture statute, holds:

> "In conclusion, the court finds that the extent of the debtor's interest in the currency at the commencement of the case was a right to claim the

> currency at a forfeiture hearing; that such interest became property of the estate upon commencement of the case; and that such property of the estate was turned over to the trustee when he was given a forfeiture hearing provided in Maryland Annotated Code Act. 27, § 297."

Likewise, in this case, the Debtors-In-Possession were given the right to a forfeiture hearing, which they exercised by execution of the "Stipulation Re Forfeiture," wherein certain properties were conceded by the state to be released from forfeiture and other property was confiscated. That right of hearing, in accordance with *Ivers*, supra, and the Montana law, was in existence at the date of commencement of the case and, while the judgment was entered against the Debtor without relief of the automatic stay pursuant to the stipulation, I deem such matter unimportant in the context of this case since the issue of whether the judgment is void has never been raised by the Trustee. Moreover, if the judgment is void, *see, In re Shamblin*, 890 F.2d 123, 126, Ftn.3 (9th Cir. 1989), then the only right of the Trustee is another hearing on the forfeited property in accordance with *Reid*, supra. The Trustee does not seek that relief in the Complaint. Obviously, in a pre-petition forfeiture case, the defenses of the Trustee are limited due to the relation back doctrine, because the Trustee's rights are no greater than those of the Debtor, which is to demonstrate the seized assets are untainted by the criminal activity.

For all of the above reasons, I conclude the seizure of the tainted property of the Debtors occurred pre-petition, that title vested in the county at the date of seizure by operation of law pursuant to Section 44-12-102, Mont.

Code Ann., and that the Debtors were given an opportunity for hearing on the forfeiture, which resulted in consummation of the forfeiture by order of the state district court. From this conclusion, I hold the Trustee has no legal or equitable right to the property held by the Defendant County pursuant to the forfeiture. This is consistent with the purpose of 11 U.S.C. § 726(a), which is to prevent depletion of the estate by the Debtor for his previous wrongdoing so that the funds would not end up in the hands of the Debtor who committed the criminal act. *In re Reid*, supra, at 305. Thus, the Trustee has the right to establish a claim against the funds or property which are not tainted or fruits of the illegal conduct. Since that right was exercised by the Debtor-In-Possession who has the same powers as a Trustee, 11 U.S.C § 1107(a), the estate's interest in the seized property was recognized by the county and state court in the forfeiture proceeding.

IT IS ORDERED the Defendant's Motion For Summary Judgment is granted and the Plaintiff's Complaint is dismissed.

/s/ John L. Peterson
JOHN L. PETERSON
United States Bankruptcy Judge
P.O. Box 689
Butte, MT 59703

MONTANA TWELFTH JUDICIAL DISTRICT COURT,
CHOUTEAU COUNTY

STATE OF MONTANA, Petitioner, -vs- $28,260.26 and Miscellaneous cultivation equipment, Respondent.	*	Cause No. DV-87-093 JUDGMENT and ORDER OF FORFEITURE (Filed Oct. 28, 1988)

****

On December 3, 1987, the State of Montana filed an action herein seeking the forfeiture of property described in a Petition For Forfeiture pursuant to section 44-12-101, MCA, et. seq. On October 6, 1988, the parties filed two stipulations with the court, wherein the parties agreed to the disposition of all property that is the subject of this action except for one item, an air conditioner. Now therefore, the court being fully advised in the premises and pursuant to the stipulations of the parties,

IT IS HEREBY ORDERED and ADJUDGED as follows:

1. Funds held in the First State Bank of Fort Benton on December 3, 1987, in checking account number 27-09060 in the name of Richard M. Kurth and Judith M. Kurth in the amount of Seven Hundred Nineteen and 27/100 Dollars ($719.27) shall be forfeited to the State of Montana for distribution to the law enforcement agencies involved in this action, to be deposited in their drug forfeiture accounts.

2. Funds held in Dain Bosworth, Inc., on December 3, 1987, in account number GF24 4885-6000 4L 4L in the name of Richard M. Kurth and Judith M. Kurth in the amount of Seventeen Thousand Two Hundred Ninety-seven and 66/100 Dollars ($17,297.66) shall be forfeited to the State of Montana for distribution to the law enforcement agencies involved in this action, to be deposited in their drug forfeiture accounts.

3. The items listed in Exhibit "A" which is atatched [sic] hereto and by this reference incorporated herein shall be forfeited to the State of Montana, may be removed from the premises owned by Richard M. Kurth and Judith M. Kurth by Chouteau County to the extent that removal has not already taken place, and may be sold by the Chouteau County Sheriff at public auction in the same manner provided by law for the sale of property under execution, and the proceeds from said sale shall be distributed to the law enforcement agencies involved in this action, to be deposited in their drug forfeiture accounts.

4. The court makes no disposition with respect to an automatic air conditioner system listed in Exhibit "A" in the petition for forfeiture, that item remaining subject to further action in this cause.

5. All other items which have been the subject of this action, including funds held by Dain Bosworth, Inc., in account number GF24 4885-6000 4L 4L held in the name of Kurth-Halley Cattle Company in the amount of Two Thousand Six Hundred Sixty-two and 37/100 Dollars ($2,652.37); and funds held by Waddell and Reed, Inc., in account number 11371036-750 held in the name of

Richard M. Kurth and Judith M. Kurth in the amount of Seven Thousand Five Hundred Eighty and 96/100 Dollars ($7,580.96) shall be released from this action to Respondents, subject, however, to the Respondents understanding that the funds held in said accounts may be subject to other liens or assessments by the Montana Department of Revenue or other creditors.

DATED this 27 day of October, 1988.

/s/ Illegible
DISTRICT COURT JUDGE

cc: Chouteau County Attorney
Julie A. Macek

EXHIBIT "A"

39	hanging lamps with shield (homemade)
41	electrical transformer boxes or relays
3	electrical breaker boxes
12	electrical timers
7	outlet boards with three outlet boxes each
3	round thermometers
6	overhead tracks for hanging lights
2	actuator motors for tracks
6	flourescent [sic] light fixtures
3	electric baseboard heaters
2	electrical thermostats with thermometer and humidity guage [sic] combination
1	pair of small pruning shears
11	electrical fans of mixed types
1	Ohaus Dial-O-Gram scale

Mr. Thomas J. Sheehy
Chouteau County Attorney
P.O. Box 518
Fort Benton, MT 59442
(406) 622-3396
Attorney for petitioner

MONTANA TWELFTH JUDICIAL DISTRICT COURT,
CHOUTEAU COUNTY

STATE OF MONTANA, Petitioner, -vs- $28,260.26 and Miscellaneous cultivation equipment, Respondent.	*	Cause No. DV-87-093 MOTION FOR FORFEITURE (Filed Oct. 28, 1988)

****

The parties hereby move this court to enter its forfeiture order in accordance with the Stipulations of the parties filed with this court on October 6, 1988. The parties further inform the court that in paragraph 1 of the Stipulation dated September 30, 1988, wherein reference is made to a stipulation dated September 4, 1988, said September 4, 1988, stipulation is the other stipulation filed with the court on October 6, 1988, signed by the Chouteau County Attorney and the Respondents Kurth and Halley.

A proposed order is submitted herewith for the court's use, said order having been first reviewed by the attorney's of record for the parties.

Respectfully submitted this 24th day of October, 1988.

/s/ Thomas J. Sheehy
Thomas J. Sheehy
Chouteau County Attorney
P. O. Box 518
Fort Benton, MT 59442

/s/ Julie A. Macek
Julie A. Macek
520 Third Ave. North
Great Falls, MT 59401
Attorney for Respondents

JULIE A. MACEK
Law Offices of Ralph T. Randone, P.C.
520 Third Avenue North
Great Falls, MT 59401
Telephone: (406) 727-5050
Attorney for Respondents

MONTANA TWELFTH JUDICIAL DISTRICT COURT,
CHOUTEAU COUNTY

STATE OF MONTANA, Petitioner, -vs- $28,260.26 and Miscellaneous cultivation equipment, Respondent.	No. DV-87-093 STIPULATION RE FORFEITURE (Filed Oct. 26, 1988)

COMES NOW, JULIE A. MACEK, Co-Counsel for the above Respondents and hereby stipulates with THOMAS J. SHEERY, Chouteau County Attorney on behalf of the Petitioner, as follows:

1. That the prior Stipulation of the parties dated September 4, 1988, be filed with the Court and that the Court issue its Forfeiture Order accordingly.

2. That the parties hereby agree that one item, an air conditioner, has not been included in the original Stipulation and is it disposition is hereby reserved by the Court.

DATED this 30th day of September, 1988.

/s/ Thomas J. Sheehy
THOMAS J. SHEEHY
Chouteau County Attorney

/s/ Julie A. Macek
JULIE A. MACEK
Attorney for Respondent

3. That the DAIN BOSWORTH, INC. account number GF24-4885-8100 4L 4L held in the name of RICHARD M. KURTH and JUDITH M. KURTH in the amount of SEVENTEEN THOUSAND TWO HUNDRED NINETY-SEVEN and 66/100 DOLLARS ($17,297.66) shall be forfeited to Choteau [sic] County.

4. That the Waddell & Reed, Inc. account number 11371036-750 held in the name of RICHARD M. and JUDITH M. KURTH in the amount of SEVEN THOUSAND FIVE HUNDRED EIGHTY and 96/100 DOLLARS ($7,580.96) shall be released from the forfeiture action by Chouteau County. Respondents understand that said money may be subject to other liens or assessments by the Department of Revenue or other creditors.

5. That the following items shall be forfeited by the Respondents and may be removed from the premises by Chouteau County if not already done so:

39 hanging lamps with shield (homemade)

41 electrical transformer boxes or relays

3 electrical breaker boxes

12 electrical timers

7 outlet boards with three (3) outlet boxes each

3 round thermometers

6 overhead tracks for hanging lights

2 actuator motors for tracks

6 flourescent [sic] light fixtures

3 electric baseboard heaters

2 electric thermostats with thermometer and humidity guage [sic] combination

1 pair of small pruning shears

11 electrical fans of mixed types

1 Ohaus Dial-O-Gram scale

/s/ Thomas Sheehy illegible
THOMAS SHEEHY DATED
Chouteau County
Attorney

/s/ Judith Kurth illegible
JUDITH KURTH DATED

/s/ Rhonda Kurth 8-22-88
RHONDA KURTH DATED

/s/ Cindy Halley 8-22-88
CINDY HALLEY DATED

/s/ Richard Kurth illegible
RICHARD KURTH DATED

/s/ Douglas Kurth 8-22-88
DOUGLAS KURTH DATED

/s/ Clay Halley 8-22-88
CLAY HALLEY DATED

/s/ William Kurth 9-4-88
WILLIAM KURTH DATED

House Tax Committee

* * *

Taxation Committee
March 5, 1987
Page 4

CONSIDERATION OF HOUSE BILL NO. 791: Rep. Bill Strizich, House District #41, sponsor of HB 791, said the bill would create a controlled substance tax for possession and storage of dangerous drugs. Rep. Strizich provided copies of a drug confiscation list and an article from the Wall Street Journal (Exhibits #3 and #4) and said the tax is substantial, but appropriate. He also provided copies of proposed amendments (Exhibit #5).

PROPONENTS OF HOUSE BILL NO. 791: Michael Murray told the Committee he represented 31 chemical dependency treatment centers in the state, and said revenue from such a tax would help in funding these programs.

Gary Carroll, Department of Justice, Criminal Investigation Division, said he is not an attorney and has no legal opinion, but has supported the concept for four years. Mr. Carroll said the amendment would help with enforcement, and commented that the figures for marijuana on the drug confiscation list are a little low.

OPPONENTS OF HOUSE BILL NO. 791: There were no opponents of the bill.

TECHNICAL COMMENTS ON HOUSE BILL NO. 791: Ken Morrison, Administrator, Income Tax Division DOR, told the Committee DOR needs rulemaking authority, as well as to be notified of seizure and possession charges

and federal and state forfeitures. Mr. Morris said he had no idea what the percentage should be, but was aware the 1% collection fee is insufficient and may need to be about 5%. He told the Committee he has been in touch with Florida, who has a similar program, and recommended using general DOR lien provisions in Title 15, chapter 1, part 7.

Chairman Ramirez requested that DOR prepare amendments to meet its concerns.

QUESTIONS ON HOUSE BILL NO. 791: Rep. Patterson asked if the penalty for evasion were stiff. Ken Morrison replied he assumed standard evasion procedures would apply.

CLOSING ON HOUSE BILL NO. 791: Rep. Strizich made no closing comments.

DISPOSITION OF HOUSE BILL NO. 791: Rep. Ream made a motion that HB 791 DO PASS and that Rep. Strizich' amendment and DOR's amendments be approved, (Exhibits #4 and #5). The motions for both amendments CARRIED unanimously.

Rep. Ream made a motion to approve the Statement of Intent. The motion CARRIED unanimously.

Rep. Ream made a motion that HB 791 DO PASS AS AMENDED.

Rep. Williams commented he felt it was inappropriate to tax illegal possession of dangerous drugs. Greg Groepper replied that the federal government originally established a federal stamp tax in the 1930's on marijuana. He said the DOR amendment replaces the section on lines with a

warrant for restraint, and utilizes the usual tax collection method.

The motion made by Rep. Ream CARRIED with all members voting aye, except Rep. Williams, who voted no.

HB 791, introduced bill, be amended as follows:

1. Title, line 6.
Following: "TAX;"
Strike: "AND"
Insert: "GRANTING RULEMAKING AUTHORITY TO THE DEPARTMENT OF REVENUE; PROVIDING FOR FUNDING OF THE ADMINISTRATION OF THE TAX; STATUTORILY APPROPRIATING THE ADMINISTRATIVE FUNDING;"

2. Title, line 7.
Following: "COLLECTED"
Insert: "; AND AMENDING SECTION 17-7-502, MCA"

3. Page 1.
Following: line 7
Insert: "WHEREAS, dangerous drugs are commodities having considerable value, and the existence in Montana of a large and profitable dangerous drug industry and expensive trade in dangerous drugs is irrefutable; and

WHEREAS, the state does not endorse the manufacturing of or trading in dangerous drugs and does not consider the use of such drugs to be acceptable, but it recognizes the economic impact upon the state of the manufacturing and selling of dangerous drugs; and

WHEREAS, it is appropriate that some of the revenue generated by this tax be devoted to

continuing investigative efforts directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana.

THEREFORE, the Legislature of the State of Montana does not wish to give credence to the notion that the manufacturing, selling, and use of dangerous drugs is legal or otherwise proper, but finds it appropriate in view of the economic impact of such drugs to tax those who profit from drug-related offenses and to dispose of the tax proceeds through providing additional anti-crime initiatives without burdening law abiding taxpayers."

4. Page 2, line 3.
Following: "of"
Strike: "1%"
Insert: "5%"

5. Page 3, lines 17 through 19.
Following: "5," on line 17
Strike: remainder of line 17 through line 19 in its entirety
Insert: "Administration and enforcement – department rules. (1) All law enforcement personnel and peace officers shall promptly report each person subject to the tax to the department, together with such other information which the department may require, in a manner and on a form prescribed by the department.

(2) The deficiency assessment provisions of 15-53-105, the civil penalty and interest provisions of 15-53-111, the criminal penalty provisions of 15-30-321(3), the estimation of tax provisions of 15-53-112, and the statute of limitations provisions of 15-53-115 apply to this tax

and are fully incorporated by reference in this chapter. The department may adopt such rules as are necessary to administer and enforce the tax."

6. Page 3, line 24 through line 3, page 4.
Following: "7," on line 24, page 3
Strike: remainder of line 24 through page 4, line 3 in its entirety
Insert: "Warrant for distraint. If all or part of the tax imposed by this chapter is not paid when due, the department may issue a warrant for distraint as provided in Title 15, chapter 1, part 7. The resulting lien shall have precedence over any other claim, lien, or demand thereafter filed and recorded."

7. Page 4, line 12.
Following: "proceeds."
Insert: "(1)"

8. Page 4, line 15.
Following: "basis."
Insert: "(2)"

9. Page 4.

Following: line 18
Insert: "(3)"
Following: "tax"
Insert: "proceeds as follows:

(a) 85%"

10. Page 4, line 23.
Following: "jails"
Insert: "; and

(b) 15% to the special law enforcement assistance account created in 44-13-101 for the activities described in 44-13-103"

11. Page 4.
Following: line 23
Insert: "Section 10. Special revenue account. (1) There is created a special revenue fund to be called the dangerous drug tax administration fund.

(2) All administrative fees collected under [section 3(1)] shall be deposited by the department into the dangerous drug tax administration fund.

(3) The money in the dangerous drug tax administration fund may be expended by the department to administer the tax and pay any refund required by this chapter.

(4) The appropriation made in subsection (3) is a statutory appropriation as provided in 17-7-502.

Section 11. Section 17-7-502, MCA, is amended to read:

"17-7-502. Statutory appropriations – definition – requisites for validity. (1) A statutory appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the need for a biennial legislative appropriation or budget amendment.

(2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both of the following provisions:

(a) The law containing the statutory authority must be listed in subsection (3).

(b) The law or portion of the law making a statutory appropriation must specifically state that a statutory appropriation is made as provided in this section.

(3) The following laws are the only laws containing statutory appropriations:

(a) 2-9-202;

(b) 2-17-105;

(c) 2-18-812;

(d) 10-3-203;

(e) 10-3-312;

(f) 10-3-314;

(g) 10-4-301;

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* * *

Senate Taxation
March 25, 1987
Page Six

CONSIDERATION OF HB 791: Representative Strizich, House District 41, presented this bill to the committee. This bill is intended to create a controlled substance tax. It would impose a tax on the possession or storage of any of those substances, defined under statute as dangerous drugs. Drug dealers, under this act, would be levied a tax equal to 10% of the market value of any substance falling under this category. He furnished the committee with an article from *The Wall Street Journal* in relation to this and a list of drugs and amounts confiscated in 1986, attached as Exhibit 4.

PROPONENTS: None.

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Crippen asked Representative Strizich how would you prove ownership to tax it.

Representative Strizich said in a criminal case, there must be proof, beyond a reasonable doubt, that this person is carrying dangerous drugs. In a civil administrative proceeding you must show a preponderance of evidence that this person is storing dangerous drugs.

Senator Hirsch said the word tax bothers him and asked if a penalty could be used.

Representative Strizich when you are talking about a penalty you are talking about a punitive measure and he thinks that would be entering a whole new ball game. We want to have the effect of a tax and, therefore, allow the fairness of our tax system to enter into this.

Senator Halligan asked if there was a threshold amount before the tax would apply.

Representative Strizich said we left that open to any amount.

Senator Neuman asked if he had visited with members of the law enforcement community and are they in support of this law.

Representative Strizich said he has talked with the Department of Justice here and did offer some amendments that make it administratively more easy to handle. Three other states effectively use this law.

Senator Neuman asked John LaFaver if this is something we could legitimately do.

John LaFaver said the way the bill is amended, the only administrative cost that will incur will be paid for by the revenues that would come from the bill. He is somewhat acquainted with the Revenue Director in the State of Minnesota and he views this piece of legislation very seriously. We might get revenue from this specific tax, and in certain instances lead us to income that would otherwise not be taxed. He thinks it is worth a shot.

Senator Mazurek asked if there was any discussion in the House on the earmarking of the money.

Representative Strizich said there was some discussion on that and the feeling was they could go with that given the fact that we really don't know what revenue we are looking at and that is probably as appropriate a place as any to funnel the money.

Senator Eck asked if the illegal storing of prescription drugs would be covered under this.

Representative Strizich said yes.

Senator Halligan referred to page 3, lines 14-17, and asked if the individual at the Department would know the street value of these drugs.

Representative Strizich said that is there in the event we find a drug that isn't publicly contained in statute, so that we could somehow determine a street value of that.

Senator Halligan asked what if you're someone that has been picked up with drugs, but you do not have any money to pay the tax.

John LaFaver said there will be a number of instances where there won't be any revenue collected.

Representative Strizich closed.
